UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

CAESARS ENTERTAINMENT CORPORATION,
D/B/A RIO ALL-SUITES HOTEL AND CASINO

Case No. 28-CA-060841

and

INTERNATION UNION OF PAINTERS AND
ALLIED TRADES, DISTRICT COUNCIL 15,
LOCAL 159, AFL-CIO

BRIEF OF *AMICUS CURIAE*
ARKANSAS STATE CHAMBER OF COMMERCE AND THE ASSOCIATED BUILDERS & CONTRACTORS OF ARKNASAS
IN SUPPORT OF CAESARS ENTERTAINMENT CORPORATION,
d/b/a RIO ALL-SUITES HOTEL AND CASINO

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III. INTEREST OF AMICUS CURIAE

The Arkansas State Chamber of Commerce ("ASCC") and The Associated Builders & Contractors of Arkansas ("ABCA") in representing the interest of its members, files this amicus brief in support of Casers Entertainment Corporation, d/b/a Rio All-Suites Hotel and Casino (Caesars). The Amici Curiae agrees with Caesars and files this brief for the purpose of informing the National Labor Relations Board ("NLRB" or "the Board") of the ASCC and ABCA's position with respect to the issues brought before the Board in this case and offer practical considerations that favor the Board's previous rule as established in *In Re the Guard Publ'g Co.*, 351 N.L.R.B. 1110 (2007) ("Register Guard"). The issues raised are obviously of paramount importance to the Amici Curiae, as it represents the employers in the State of Arkansas who will inevitably be affected by the outcome of the Board's decision with respect to the certified questions at issue.

IV. ISSUES PRESENTED

On August 1, 2018, the Board issued a request to interested amici to file briefs on the following questions:

1. Should the Board adhere to, modify, or overrule *Purple Communications*?

2. If you believe the Board should overrule *Purple Communications*, what standard should the Board adopt in its stead? Should the Board return to the holding of *Register Guard* or adopt some other standard?

3. If the Board were to return to the holding of Register Guard, should it carve out exceptions for circumstances that limit employees' ability to communicate with each other through means other than their employer's email system (e.g., a scattered workforce, facilities located in areas that lack broadband access)? If so, should the Board specify such circumstances in advance or leave them to be determined on a case-by-case basis?

4. The policy at issue in this case applies to employees' use of the Respondent's "[c]omputer resources." Until now, the Board has limited its holdings to employer email systems. Should the Board apply a different standard to the use of computer resources other than email? If so, what should that standard be? Or should it apply whatever standard the Board adopts for the use of employer email systems to other types of electronic communications (e.g., instant messages, texts, postings on social media) when made by employees using employer-owned equipment?

V. ARGUMENT

In 2012, the NLRB issued a charge against Purple Communications, a deaf and hard-of-hearing communications technology company based out of California, alleging, among other things, that its company email policy was overly broad and unduly restrictive to its employees' ability to discuss working conditions and terms of employment. *Purple Communications, Inc.*, 361 NLRB 1050 (2014). The relevant email and other company communications policy facing the NLRB's scrutiny in that case stated:

> Computers, laptops, internet access, voicemail, electronic mail (email), Blackberry, cellular telephones and/or other Company equipment is provided and maintained by Purple to facilitate Company business. All information and messages stored, sent, and received on these systems are the sole and exclusive property of the Company, regardless of the author or recipient. All such equipment and access should be used for business purposes only.

Id. at 1051.

The policy was challenged after an unsuccessful representation election was conducted by a local union. The NLRB's General Counsel argued that the employer's policy was overly broad because it prohibited the use of company email for "engaging in activities on behalf of organizations or persons with no professional or business affiliation with the company," thus interfering with the employees' exercise of Section 7 rights. *Id*. The General Counsel conceded that ruling in its favor would require overruling the NLRB's previous holding in *Register Guard*, 351 NLRB 1110 (2007). The administrative law judge assigned to the *Purple Communications* case held, "I am bound to follow Board precedent that has not been reversed by the Supreme Court." *Purple Communications*, 361 NLRB at 1112. The ALJ added that any decision to overrule binding precedent was for the NLRB to decide. *Id*. The case was appealed.

On appeal, the NLRB's General Counsel argued that *Register Guard* should be overruled

because it failed to appreciate the importance of electronic communications among employees in the modern workforce. *Id.* at 1052. The General Counsel cited statistics showing that email communications are becoming the most prevalent method of communication and that it is only expected to grow in the near future. The General Counsel also asserted that employers could still restrict employees' use of company email systems by showing that, under a particularized showing, the employer's interest in maintaining production and efficiency outweighs its employees' Section 7 rights. *Id*.

In response, Purple Communications and several amicus briefs argued just the opposite. First, the opposition contended that granting employees' unrestricted access to company email accounts for nonworking purposes could lead to unintended consequences, such as increased spam and a heightened risk of viruses to email systems that could cause disruptions to workplace efficiency. *Id*. at 1053.

Second, the opponents argued that in-person conversations among employees while at work ("water cooler discussions") during nonworking time still protects Section 7 rights without those negative consequences. *Id*. Moreover, if email communications are allowed to be sent to individuals or entities outside of the company, then there exists a risk of disclosure of confidential and proprietary information, whether intended or not, due to the fact that many employers would be required to adjust their firewalls and other security software to allow outside emails to be exchanged among their employees. *Id.*

Third, Purple Communications and interested employers also argued that the increased use of personal communication devices with cellular and internet capabilities, as well as the availability of free and publicly available email and social media accounts, provides employees' with the opportunity to have any desired conversations while off work. *Id*. Once again, employers contended

that this protects Section 7 rights without infringing on employers' property or increasing the risk of security breaches, lost productivity or email system failures. *Id.* In light of these unintended consequences, Purple Communications and other interested parties contended that the standard set forth in *Register Guard* was an appropriate rule with regard to access to and use of company email. *Id*.

After addressing the arguments raised by employers and business groups, as well as extensive arguments raised by the dissenting board members Phil Miscimarra and Harry Johnson, the majority–Chairman Mark Pearce and board members Kent Hirozawa and Nancy Schiffer–overturned *Register Guard* and issued their new *Purple Communications* rule based on previous U.S. Supreme Court precedent set in *Republic Aviation Corp. v. N.L.R.B.*, 324 U.S. 793 (1945). *See Purple Communications*, 361 NLRB at 1050.

In other words, rather than analyzing the issue to be whether an employee has the right to use company equipment, the majority analyzed the case as an issue involving "access" to an employer's premises and the right of employees to engage in Section 7 activities, on nonworking time, while on the employer's premises. In short, the majority viewed the company email system as a virtual workplace and "fundamentally a forum for communication." *Id*. at 1060.

Accordingly, the majority set out a new analytical framework for evaluating employees' use of their employer's email systems. *Id*. Under this framework, employees who have been granted access to their company's email systems must be allowed to use them to engage in protected Section 7 communications during nonworking time. *Id*. at 1063. The fact that employees may have alternative methods of communication available to them (e.g., face-to-face discussion, social media or personal email accounts) does not excuse the employer from allowing employees to use company email for protected Section 7 communications. *Id*. The majority indicated that employers may apply

uniform and consistently enforced controls over email systems "to the extent that those controls are necessary to maintain production and discipline," and they also noted that there may be rare situations "where special circumstances justify a total ban on non-work email use by employees." *Id.* However, the majority made it clear that such restrictions would have to be weighed against an employee's right to engage in protected speech. Indeed, the NLRB pointed out that

> [this] decision cannot resolve all the questions that will arise as a result of our recognizing the right of employees to use their employers' email systems for protected communications on nonworking time, let alone as a result of the still more advanced electronic communications systems now in existence and yet to come.

Id. at 1066. The NLRB did not decide the applicability of this standard to nonemployee third parties.

As discussed more fully below, the Board should overrule *Purple Communications* and return to its standard in *Register Guard*. The Board's departure from the *Register Guard* standard in *Purple Communications* was an ill-advised departure from the principles and precedent set by the Board. Further, the Board's holding in *Register Guard* should be applied to all other electronic forms of communication provided by an employer. Whether employees use email, instant messenger, or any other form of electronic communication provided and maintained by the employer on an employer's computer system and over the employer's network, the employer's property rights in said electronic means, and its interest in maintaining production and efficiency should be paramount. Further, due to the many alternative forms of electronic communication available to employees (e.g., smart phones, Facebook, Twitter, Instagram, Snap Chat, etc.) any argument that employee Section 7 rights are being chilled is simply inaccurate.

A. The Board should Overrule *Purple Communication*.

The Board should overrule *Purple Communications*. Although email communications are becoming more prevalent in our society as a form of communication, the Board's application of

Republic Aviation in *Purple Communications* was misapplied in light of the form of communication involved and the plethora of easily accessible alternative forms of communication available to employees. Further, returning to the *Register Guard* standard is consistent with longstanding Board precedent that reinforces the rights of employers to restrict the nonbusiness uses of its equipment and property. *See Mid-Mountain Foods*, 332 NLRB 229, 230 (2000) (stating no statutory right to use the television in the respondent's breakroom to show a pro-union campaign video), enfd. 269 F.3d 1075 (D.C. Cir. 2001). *See also Eaton Technologies*, 322 NLRB 848, 853 (1997) ("It is well established that there is no statutory right of employees or a union to use an employer's bulletin board."); *Champion International Corp.*, 303 NLRB 102, 109 (1991) (stating that an employer has "a basic right to regulate and restrict employee use of company property" such as a copy machine); *Churchill's Supermarkets*, 285 NLRB 138, 155 (1987) ("[A]n employer ha[s] every right to restrict the use of company telephones to business-related conversations . . . ."), enfd. 857 F.2d 1474 (6th Cir. 1988), cert. denied 490 U.S. 1046 (1989); *Union Carbide Corp.*, 259 NLRB 974, 980 (1981) (stating the employer "could unquestionably bar its telephones to any personal use by employees"), enfd. in relevant part 714 F.2d 657 (6th Cir. 1983); *cf. Heath Co.*, 196 NLRB 134 (1972) (stating an employer did not engage in objectionable conduct by refusing to allow pro-union employees to use public address system to respond to anti-union broadcasts). Board precedent makes clear that *Purple Communications* should be overruled.

Republic Aviation requires the balancing of employees' Section 7 rights and against the employer's interest in maintaining discipline. 324 U.S. at 803. In that case an employee was discharged after being warned about violating the employer's solicitation rule because he was passing out union application cards in his employer's plant on his own time, during lunch. *Id*. at

795. As was discussed in both *Register Guard* and the *Purple Communications* dissent, this case is distinguishable from the facts in *Purple Communications*. *Republic Aviation's* distinguishing characteristic is that the issue there was dealing with face-to-face communication, whereas *Purple Communications* and *Register Guard* were dealing with the property rights of the employer due to employee email use. To comingle these two distinct forms of communication and essentially lump electronic communication and face-to-face communication together was an error on the Board's part in *Purple Communications*. Therefore, an employer's property interest, as the above mentioned precedent has established, outweighs employees' interest in using their employer's email for non-work related purposes. Under the *Register Guard* standard, this restriction is kept in check by prohibiting discrimination on NLRA-protected communication.

Further, the Board's decision in *Purple Communications* has placed employers in an awkward position in relation to *their* property. Specific issues arise in relation to storage capacity of an employer's messaging systems, issues in litigation and e-discovery, and an employer's ability to monitor their computer systems.

The Board's *Purple Communications* rule compelling employers to allow employees to use company email for personal communications has had far reaching impacts. Employer's email systems should not be viewed as electronic "water coolers" as suggested by the General Counsel in *Purple Communications*, or some area in a virtual workplace where employees on nonworking time can engage in protected speech as envisioned by the majority. On the contrary, email systems are more like postal services that combine written communications with incredible storage capacity. With these systems, every email becomes a "document" that is instantly stored until someone purges it from the system's electronic memory. The burdens of maintaining such a system for business use only are already considerable.

Generally, email systems have substantial storage capacity, but that capacity is not unlimited. Under *Purple Communications,* employees are allowed to use company email systems for personal communications (without trying to weed out protected speech from unprotected speech), the "documents" retained on company systems has increased and may potentially exceed available storage capacity for some businesses. This requires the employer to obtain additional server space or purge the emails of its employees. Employers are now being held responsible for bearing the cost of storing personal emails. Alternatively, if an employer decides to purge emails in order to make storage space available, the employer may be held responsible for purging a personal document containing protected speech that the employee wanted retained. This has left employers with a multitude of questions like: how does one distinguish protected and unprotected emails? How long must protected emails be retained? If an employer's current practice is to purge cached emails after 30 days, must a six-month period be implemented to avoid a spoliation claim by a union, employee or the NLRB's General Counsel? In addition, most companies have spam-blocking software on their email systems to help protect their computer systems health from viruses or other cyber-attacks. If the spam filter blocks an email due to a union flyer attachment, will this now result in an unfair labor practice? Under the Purple Communications standard, it most likely would.

The burdens of maintaining email and other electronic records are considerable, particularly when records are pertinent to litigation. As federal courts have discovered in the past few years, sorting through electronic document production, metadata, document retention and spoliation issues can be a nightmare. This nightmare will, if it hasn't already, be visited upon the NLRB, employers, unions and employees if email and other electronic records become relevant in grievances, arbitrations, board actions, and appeals to federal courts. Who will bear the costs

of looking through terabytes or petabytes of information to find the relevant emails? And what happens if the dispute is not between the employer and the employee, but is between the employee and a third party? Can the employee be required to reimburse his/her employer for the cost of producing the employee's personal email for use in a non-work-related litigation?

Finally, many employers have adopted policies prohibiting employees from misusing company computers (e.g., using company computers to engage in harassment, view pornography, run personal businesses or download pirated software). These policies often require information technology supervisors and staff to regularly monitor employee use and report any violations. Such routine monitoring has become problematic if the employer and employees are going through the union organizing process, collective bargaining or a grievance. Could monitoring of employee email or internet usage in those situations be considered unlawful surveillance?

In the post-*Purple Communications* world, the NLRB's administrative law judges are not only enforcing the *Purple Communications* standard, but they are also expanding it. In *Insight Global, LLC*, 2016 WL 6921209, an administrative law judge found the employer's email policy violated Section 8(a)(1) of the Act because it unreasonably restricted employees' use of a customer's email system. The judge found that "[t]he fact that the [employer] is restricting its employees' use of third party email systems, as opposed to its own email system, is in essence, inconsequential." *Id*. at appx. 13. The employer's email policy stated in relevant part that "[c]ustomer's e-mail and internet systems are to be used solely for the purposes of completing the Contract Assignment. In addition, Contract Employee agrees that the use of Customer[']s systems to transmit, download, or distribute offensive materials, language, profanity, offensive images, or any other inappropriate material is prohibited." *Id*. at appx. 12. Thus, the restriction

was not on the employer's email, but instead on customer email and internet systems.

The judge dismissed the employer's legitimate business justifications that the policy was meant to protect the security of its customer's computer systems in order to prevent unauthorized access or disclosure of private, sensitive or confidential data stored on the customer's computers. It was also meant to prevent unlawful harassment and discrimination in the customer's workplace via email. *Id*. at appx. 15. In finding these justifications insufficient the judge quoted *Purple Communications* stating the "mere assertion of an interest that could theoretically support a restriction will not suffice." *Id*. Specifically, the judge found that without actual proof or a record of past circumstances of a security breach or unlawful harassment over email, a theoretical assertion will not suffice to justify "such a broad restriction on non-work use of emails." *Id*. Instead, it seems that until there is a security breach or unlawful harassment, employers are not be able to show a legitimate business justification to warrant having a policy that is meant to prevent such events under the *Purple Communications* standard.

In *Cellco Partnership d/b/a Verizon Wireless and Sara Parrish*, 2015 WL 5560242 (Sept. 18, 2015); affirmed in relevant part *Cellco Partnership d/b/a Verizon Wireless and Sara Parrish* 365 NLRB No. 38 (Feb. 24, 2017), the administrative law judge found that the employer's policy regarding the use of its email system ran afoul of *Purple Communications* and thus, violated Section 8(a)(1) of the Act. *Id*. at appx. 3. The employer's policy stated in relevant part that employees "may never use company systems (such as e-mail, instant messaging, the Intranet or Internet) to engage in activities that are unlawful, violate company policies or result in Verizon Wireless' liability or embarrassment." *Id*. at appx. 8. The administrative law judge explained, and the Board affirmed, that a reasonable reading of this section could be interpreted to mean that if an employee uses company email to communicate with any employees inside the company on

behalf of a labor organization it will result in discipline. *Id*. Thus, the language was found to be overly broad resulting in a chilling effect on Section 7 activity, which violates Section 8(a)(1) of the Act. *Id*.

The NLRB also affirmed the administrative law judge's finding that the employer's solicitation and fundraising policy also ran afoul of *Purple Communications*. The employer's policy stated in relevant part "[s]olicitation during work time (defined as the work time of either the employee making or receiving the solicitation), the distribution of non-business literature in work areas at any time or the use of company resources at any time (emails, fax machines, computers, telephones, etc.) to solicit or distribute, is prohibited." *Id*. at approx. 2. Relying on *Purple Communications*, the Board affirmed the conclusion that the prohibition on solicitation as well as distributions contravenes the holding of *Purple Communications*. 365 NLRB at *3.

It is clear from this line of cases that, since *Purple Communications*, judges and the Board itself have continued to apply its standard more and more liberally, which continues to contradict pre-*Purple Communications* longstanding and established Board precedent. As was seen above in *Cello Partnership,* it is arguable that the Board is beginning to chip away at more than just employer email systems. *See Cellco Partnership*, 2015 WL 5560246 at appx. 8. Even more telling is the administrative law judge's application of the standard in *Insight Global* to include customer and/or third party email systems to which employees have access. Under *Purple Communications* the right of employers to control the use of their own property has been substantially diminished. Further, the "no harm, no foul" approach gleaned from *Purple Communications* in *Insight Global* only recognizes an employer's property rights after the damage is done. Put another way, until the employer's email system is breached, or until an employee has been subjected to unlawful harassment by another employee, employers cannot

have a policy against such conduct. Employees have adequate alternative forms of communication, most of which all are easily accessible to employees on a smartphone and would not disregard an employer's legitimate property rights.

The Board should, therefore, overrule this extremely troubling decision.

B. In overruling *Purple Communications* the Board should return to the standard applied in its *Register Guard* holding.

In overruling *Purple Communications*, the Board should return to its holding in *Register Guard*. In *Register Guard*, the Board held that an employer may prohibit employees from using the employer's email system for Section 7 purposes, even if they are otherwise permitted access to the system, so long as the employer's ban is not applied discriminatorily. *Register Guard*, 351 NLRB at 1110. A return to this standard will clear up potential ambiguity and dispense with the need for an employer to have to demonstrate a "special circumstance" after the fact to warrant the restriction of protected communications.

Purple Communications set an overly broad and unworkable standard. The standard failed to accommodate employers' property rights in their own technology resources that are costly to not only acquire, but also to maintain and secure. The standard also makes it nearly impossible for an employer to enforce any type of solicitation or anti-harassment policy with regard to email or other digital forms of communication until after a potential unlawful act has occurred due to the employer's burden of showing "special circumstances" that cannot be based on a theoretical assertion. This also makes it extremely difficult for employers to avoid unlawful surveillance of NLRA-protected activities, even if there is a legitimate reason to do so.

The *Purple Communications* standard also makes it extremely difficult to maintain productivity in the work place as by the very nature of emails, it is unlikely that an email sent during one employee's nonworking time will be received and read by the recipient employee

during that employee's nonworking time. The standard unfairly tips the scale in the employees' favor when balancing employees' right to self-organization with an employer's right to maintain discipline in their establishment. As noted above, employees have a plethora of alternative forms of communication available to them from social media to text messages and free private email accounts, all of which are available and easily accessible on smart phones and other electronic devices. Additionally, employees have always had available the old fashion face-to-face conversation.

For all the reasons mentioned above, the Board should overrule *Purple Communications* and return to its standard in *Register Guard* that allows employers to rightfully enjoy their lawful property rights in their digital communication systems provided they do not discriminate against NLRA-protected communications.

C. In returning to the *Register Guard* standard, the Board should not carve out an exception for circumstance where employees' ability to communicate is limited and instead determine them on a case-by-case basis.

In returning to the *Register Guard* standard, the Board should not carve out an exception for circumstance where employees' ability to communicate with each other is limited. *Register Guard* and prior Board precedent state that an employer has a "basic property right" to "regulate and restrict employee use of company property." *See Union Carbide Corp. v. NLRB*, 714 F.2d 657, 663–664 (6th Cir. 1983). As mentioned above, employees' have a plethora of other available forms of communication that even if employees' did not have access to email communication, they will nevertheless have access to other platforms and other avenues of communication. Thus, no matter what the platform, employers should retain the right to limit the form of of communication they provide to only business purposes. So long as employers are not

discriminating against NLRA-protected communications, the *Register Guard* standard should apply in all situations where employer provided equipment for communication is used.

D. The Board should not apply a standard different from Register Guard to other employer owned computer resources.

The Board should not adopt a new standard to apply to alternative forms of communication provided by an employer. Instead, the Board should apply its standard in *Register Guard* to other forms of employer provided digital communication. As mentioned above, when employees are using employer owned equipment, employers should enjoy the basic property right that allows for the regulation of employee use of that equipment for business purposes. *See Union Carbide Corp. v. NLRB*, 714 F.2d 657, 663–664 (6th Cir. 1983).

The Board's precedent makes clear that there is "no statutory right . . . to use an employer's equipment or media," as long as the restrictions are nondiscriminatory. *Mid-Mountain Foods*, 332 NLRB 229, 230 (2000) (no statutory right to use the television in the respondent's breakroom to show a pro-union campaign video), enfd. 269 F.3d 1075 (D.C. Cir. 2001); *see also Eaton Technologies*, 322 NLRB 848, 853 (1997) ("It is well established that there is no statutory right of employees or a union to use an employer's bulletin board."); *Champion International Corp.*, 303 NLRB 102, 109 (1991) (stating that an employer has "a basic right to regulate and restrict employee use of company property" such as a copy machine); *Churchill's Supermarkets*, 285 NLRB 138, 155 (1987) ("[A]n employer ha[s] every right to restrict the use of company telephones to business-related conversations . . . ."), enfd. 857 F.2d 1474 (6th Cir. 1988), cert. denied 490 U.S. 1046 (1989); *Union Carbide Corp.*, 259 NLRB 974, 980 (1981) (employer "could unquestionably bar its telephones to any personal use by employees"), enfd. in relevant part 714 F.2d 657 (6th Cir. 1983); *cf. Heath Co.*, 196 NLRB 134 (1972) (employer did not engage in objectionable conduct by refusing to allow pro-union

employees to use public address system to respond to antiunion broadcasts). Thus, an employer should be able to limit its employees' use of company provided communication to only work related communications, regardless of the medium, so long as there is not any discrimination on NLRA-protected communications.

The Board's standard in *Register Guard* should be applied to all other electronic forms of communication provided by the employer. Employees still have other methods by which to communicate that do not involve the use of company property. The law should remain that way. Employers should be able to lawfully bar employees' non-work related use of its electronic communication systems, so long as it is not in a manner that discriminates against Section 7 activity.

VI. CONCLUSION

For the reasons set forth above, the Board should overrule Purple Communications and return to its standard in Register Guard and extend that holding to include all forms of employer provided communication.

Respectfully submitted this 4th day of October, 2018.

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